

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

FRANK FISCHER, an individual,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2:05-cv-00763-DRB
	)	
SYSCO FOOD SERVICES OF	)	
CENTRAL ALABAMA, INC., et al.,	)	
	)	
Defendants.	)	

**DEFENDANT’S REPLY IN SUPPORT OF MOTION TO DISMISS**

COMES NOW the Defendant Sysco Food Services of Central Alabama, Inc. (hereinafter “Sysco”) and makes the following reply to Plaintiff’s Response to Defendant’s Motion to Dismiss:

1. Sysco maintains its position that dismissal is warranted.
2. Alternatively, if the Court is not inclined to dismiss the case, Sysco asks for the Court to award Sysco its reasonable expenses incurred in preparing and filing both the motion to compel and motion to dismiss, including attorney fees, pursuant to Rule 37(a)(4)(A):

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was

filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(emphasis added).

WHEREFORE, PREMISES CONSIDERED, Sysco respectfully requests the Court to dismiss the action with prejudice or in the alternative to award Sysco reasonable expenses incurred on filing the motions to compel and dismiss, including attorney's fees.

s/William D. Smith, Jr.  
William D. Smith, Jr.  
ASB-2906-T74W  
Attorney for Defendant  
Sysco Food Services  
of Central Alabama, Inc.  
STARNES & ATCHISON LLP  
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 5, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Davis L. Middlemas, Esq.  
MIDDLEMAS & BERRY, LLP  
205 North 20<sup>th</sup> Street, Suite 210  
Birmingham, Alabama 35203

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

None.

s/William D. Smith, Jr.  
\_\_\_\_\_  
William D. Smith, Jr.  
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